

10-11-2016

State v. Kilroy Respondent's Brief Dckt. 44102

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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|----------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 44102 |
| Plaintiff-Respondent, |) | |
| |) | Bonneville County Case No. |
| v. |) | CR-2015-4944 |
| |) | |
| JAMES PATRICK KILROY, |) | |
| |) | RESPONDENT'S BRIEF |
| Defendant-Appellant. |) | |
| _____ |) | |

Issue

Has Kilroy failed to establish that the district court abused its discretion by imposing a unified sentence of 25 years, with 13 years fixed, upon his guilty plea to felony child sexual abuse of a minor under 16 years of age?

Kilroy Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Kilroy pled guilty to felony child sexual abuse of a minor under 16 years of age and the district court imposed a unified sentence of 25 years, with 13 years fixed. (R., pp.183-85.) Kilroy filed a notice of appeal timely from the judgment of conviction. (R., pp.190-93.)

Kilroy asserts his sentence is excessive in light of his acceptance of responsibility and remorse, amenability to treatment, and mental health issues. (Appellant's brief, pp.4-6.) The record supports the sentence imposed.

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). To carry this burden the appellant must show that the sentence is excessive under any reasonable view of the facts. Baker, 136 Idaho at 577, 38 P.3d at 615. A sentence is reasonable, however, if it appears necessary to achieve the primary objective of protecting society or any of the related sentencing goals of deterrence, rehabilitation or retribution. Id.

The maximum prison sentence for child sexual abuse of a minor under 16 years of age is 25 years. I.C. § 18-1506. The district court imposed a unified sentence of 25 years, with 13 years fixed, which falls within the statutory guidelines. (R., pp.183-85.) At sentencing, the district court addressed the seriousness of the offense, Kilroy's past sexual offenses as a juvenile, his failure to rehabilitate, and the risk he poses to the public. (2/22/16 Tr., p.30, L.15 – p.35, L.10.) The state submits that Kilroy has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpt

of the sentencing hearing transcript, which the state adopts as its argument on appeal.
(Appendix A.)

Conclusion

The state respectfully requests this Court to affirm Kilroy's conviction and sentence.

DATED this 11th day of October, 2016.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

ALICIA HYMAS
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of October, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

1 THE DEFENDANT: Yes, your Honor, I would.
2 First of all, I am very sorry for what I did. You know, it
3 wasn't a -- I'm not a smart man, you know, but I was stupid
4 what I did.
5 I would also like the Court to look in at the
6 last time I did anything like this was 16 years ago. 16
7 years, I was a juvenile.
8 It was stupid then. I was stupid now. I
9 shouldn't have done what I did. I know I did something
10 stupid. I was human. I made a mistake. I'm sorry I did it.
11 There's a lot of stuff that I can do better.
12 And if given the opportunity, I'll prove it.
13 You know, I got two jobs out there. I got one
14 waiting for me right now. I can go back to work at Northwest
15 Cosmetics, if I want to, and the plastics factory. I got two
16 jobs waiting for me.
17 I got people that need my help. You know, I
18 got two people out there that are friends of mine that their
19 trailer's falling apart that I was rebuilding their trailer
20 before I even got locked up.
21 There are still people out there that do trust
22 me. And if the Court gives me a chance and an opportunity to
23 prove it, I'll do what I have to to prove it. All I want to
24 do is go to work and go home.
25 I won't even go around anybody. I'm tired of

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1 being around people. The more around people I am, the more in
2 trouble I get. Going to work and going home will be the only
3 thing I do.
4 And that's what I did for eight months while I
5 was waiting for this to come about, was go to work and go
6 home. That's all I did. Be honest, like I say, I'm sorry.
7 THE COURT: All right. Thank you, Mr. Kilroy,
8 for your statement.
9 Are you fully satisfied with the representation
10 of your counsel?
11 THE DEFENDANT: Yes, sir.
12 THE COURT: And, Counsel, is there any legal
13 reason why the Court should not proceed?
14 MR. RANDALL: No, your Honor.
15 THE COURT: Mr. Kilroy, there are four
16 objectives of criminal punishment. I'm going to recite what
17 those four are and then make comments about what I've heard
18 thus far by you, by your counsel, and by the State's attorney.
19 The objectives include protection of society,
20 deterrence to you and to others, rehabilitation for you, and
21 punishment for the wrongdoing.
22 And so as the Court listens very carefully to
23 the recommendations provided by the parties and by you, I must
24 apply the facts and circumstances of this case to those
25 objectives and determine whether or not they can be satisfied.

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1 And each one in your case is critically important.
2 As you might expect, individually, protection
3 of society is what drives the Court's principal obligation. I
4 want to protect the community. That's my obligation.
5 It's my responsibility to do so presented with
6 you and your case, the facts surrounding your case.
7 There needs to be punishment for the
8 wrongdoing, and that has begun upon your incarceration. The
9 purpose of the psychosexual evaluation is to evaluate a risk
10 and also determine treatment options.
11 Treatment is necessary in this case because the
12 conduct is something that requires a complete change of
13 thinking and attraction. And I need to deter you from
14 committing other offenses.
15 There are a number of things that I will
16 initially state that I think are mitigation factors in your
17 case.
18 First is that you were accountable by pleading
19 guilty. I recognize that, and that should not go overlooked
20 or unnoticed by the Court.
21 You also presented a statement today stating
22 remorse and indicate that you are sorry for what you have
23 done, that you want to simply go back to work and go home.
24 And while the Court appreciates your statement,
25 my reaction is that it's not that easy. It's not that simple

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1 to just simply return back to work.
2 You described your conduct as a stupid
3 decision. I can't describe it in that way. My description is
4 much different.
5 And if I were to try to label the conduct, as
6 you have, in a single word, of stupidity, mine would be
7 harmful.
8 And the conduct of this offense is extremely
9 serious and aggravating. The age of the child is very tender
10 in years, which is an aggravating factor.
11 You don't come before the Court free from a
12 past criminal history.
13 And if the Court simply looks at your prior
14 criminal history, setting aside this offense, we're dealing
15 with an individual who has previously been convicted of an
16 offense similar to this.
17 You discount that offense or this offense by
18 suggesting that it happened 16 years ago.
19 But that concerns the Court, that there was
20 nothing in the past related to that previous experience that
21 has deterred you from committing a new offense, one that --
22 that is as harmful as it was.
23 The grand theft, where the State describes the
24 history, so a second felony that resulted ultimately in prison
25 time; an assault misdemeanor offense; an unlawful exercise of

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1 police in 2005; a weapons offense;
2 A driving -- a couple of driving offenses; a
3 possession offense; a malicious injury to property offense;
4 another driver's license offense;
5 And a -- a cruelty to animals charge. I
6 don't -- let me verify whether that was a conviction.
7 Do the parties --
8 MR. DEWEY: It -- it was, your Honor. It's the
9 last entry.
10 THE COURT: So that offense. So there has been
11 a pattern -- undeviating pattern since 1988 of offense after
12 offense.
13 And that's without the Court's views as to
14 whether or not you're a threat to the community as it relates
15 to sexual offenses.
16 So if you're appearing before the Court on any
17 other charge, would this Court be considering probation with
18 that history? I wouldn't be.
19 You couple that with the harmful offense of
20 this case and its circumstances, and I'm convinced that there
21 needs to be a very serious consequence, one where any less
22 would deprecate the seriousness of the offense or the crime.
23 And deterrence. You have had treatment in the
24 past, and yet we're back together again today. You have had a
25 history of absconding, being granted opportunities in the

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1 community and then returning to prison.
2 Your treatment hasn't been successful in the
3 past, and you have been out committing new offenses. There
4 have been disciplinary matters in the prison system. The
5 Court believes that you are a high risk.
6 There is the lack of full and complete
7 disclosure as it relates to this offense. And what makes this
8 case aggravating is that there were threats that, if this
9 child disclosed, that you would harm her.
10 That changes the characteristic of this offense
11 in a most dramatic way as well.
12 Your version of the events is not consistent
13 nor credible based upon the materials that this Court has been
14 exposed to. And I highlight the fact that this was not an
15 isolated, one-time occurrence with this child.
16 So as I weigh all of these aggravating factors
17 and present circumstances, I am left with a very clear
18 conviction that you are a threat to the community and that you
19 perpetrated this offense for your own sexual and deviant
20 gratification.
21 And, no, you won't be in a position to go back
22 home or back to work. It's simply not that easy for the harm
23 that you have inflicted and the risk that this Court believes
24 that you are to the community.
25 Based upon those objectives of criminal

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1 punishment, the Court will sentence you as follows:
2 The Court will impose a 13-year fixed period of
3 incarceration followed by a 13-year indeterminate period of
4 incarceration.
5 The fixed period of incarceration addresses
6 those four objectives of criminal punishment.
7 The indeterminate period of incarceration
8 protects the community and ensures that there will be
9 involvement in your life, that that protection endures well
10 into the future.
11 The unified sentence is for 26 years.
12 The Court will impose a \$1,000 fine followed by
13 the victim's relief fund amount. The Court will not impose
14 public defender fees in this case.
15 I want to invite you to consider with your
16 counsel the right to appeal this, 42 days from today; the
17 right to file a Rule 35, which is a plea for leniency or to
18 correct an illegal sentence, expires in 120 days;
19 And uniform postconviction relief expires one
20 year after the appeal has expired.
21 And as statute requires by this offense, there
22 will be the requirement to register as a sex offender.
23 The amount for reimbursement, is that
24 stipulated to?
25 MR. RANDALL: It's not, your Honor, although

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1 there's no objection to the amount of the psychosexual
2 because, as the State indicated, that was agreed to as part of
3 the plea agreement.
4 As far as the restitution being open for 30
5 days, we typically see that, so there's no objection to that.
6 THE COURT: Okay. And does the State have any
7 information regarding anticipated amounts, given counseling
8 that may exist or anything associated with that?
9 MR. DEWEY: Your Honor, I know that she is
10 undertaking counseling, but I don't have those figures today.
11 So I would just ask for time to get those together.
12 THE COURT: All right. Then that is something
13 that could be dealt with between the parties. And if it
14 doesn't come to resolution, then I would invite you back to
15 Court for that.
16 Mr. Kilroy, do you have any questions for me?
17 THE DEFENDANT: No.
18 THE COURT: Okay.
19 Counsel?
20 MR. RANDALL: Your Honor, one matter is the
21 Court imposed a 13 plus 13. I believe that a unified sentence
22 in this case is a maximum of 25.
23 THE COURT: 25. Let me modify that
24 indeterminate period for 12 years.
25 (Sotto voce discussion.)

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